NO. 80-1034

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

The Honorable RICHARD A. WARMUTH,

Appellant,

v.

DAVID ALAN JONES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS APPEAL

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QUESTION PRESENTED

Should the Supreme Court review actions by a state court which rest on adequate non-federal grounds and do not invalidate federal law?

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia (J.S. App. A 1-27) is reported at 272 S.E.2d 446.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered November 25, 1980, granting Appellee's petition for a writ of prohibition. The notice of appeal was filed on December 9, 1980 (J.S. App. C 1-3). The jurisdiction of this Court is invoked solely under 28 U.S.C. §1257(1). (J.S. 3).

STATEMENT

I.

On May 30, 1979, a felony information was filed in the State of Oklahoma charging the appellee with the commission of second degree murder. Upon request of Oklahoma authorities, a magistrate in Marshall County, West Virginia, issued a warrant for Jones' arrest, which warrant was executed. Jones was jailed and remains in the custody of

the Sheriff of Marshall County.

II.

On June 25, 1979, the Governor of Oklahoma requested West Virginia to extradite the appellee to bring him to trial in Oaklahoma.

At the first extradition hearing held in the Circuit Court of Marshall County on July 31, 1979, Appellee's attorney filed a Petition to Determine Competency, it being counsel's belief that Jones was mentally incapable of assisting his counsel in preparing and presenting a petition for a writ of habeas corpus. Consistent with that theory, a psychiatric examination of the appellee was sought by counsel, agreed to by the prosecuting attorney[1], and granted

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[1]The exchange among counsel and the Court was as follows:

THE COURT: Is the petition to determine competency in any way resisted, Mr. Karl?

MR. KARL: No, Your Honor, for several reasons. After conferring with members of the sheriff's office, I am aware of the defendant/petitioner confinement in the Northern Panhandle Mental Health

by Judge Steven N. Narick, who ordered that the examiners report on Jones' " . . . competency to assist his counsel in preparing a Petition for a Writ of Habeas Corpus, and further as to his competency to participate and assist his counsel in a hearing in such a Habeas Corpus proceeding."

After two psychiatric examinations

Center on at least three occasions; further, I am aware of an attempted suicide by hanging while the defendant/petitioner was incarcerated in the Marshall County Jail. And, in addition there has recently been filed an application for involuntary committment which is, as a matter of fact, set for a probable cause hearing. So for these reasons, the State does not resist and, in addition, because of the serious nature of the offense he's charged with.

THE COURT: Is there any reason why your petition is not verified, gentlemen?

MR. RECHT: Is not verified? Yes, Your Honor, because I'm not really sure whether or not Mr. Jones realizes what is contained in it. It's consistent with our total theory.

resulted in apparently conflicting opinions[2], a third examination was ordered by the appellant Warmuth, who by normal rotation had replaced Judge Narick in the case. The third examiner, Doctor Jonathan Himmelhoch, concluded that Jones was mentally unable to assist his attorneys.

Ten months after the order granting the examination, at a hearing on May 5, 1980, the prosecutor for the first time raised the question of whether mental competency is a relevant consideration in extradition proceedings.[3] Judge Warmuth agreed with the State's position and ruled that competency

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[2]On October 31, 1979, Dr. David Hill (a psychiatrist) filed his report indicating, in essence, that it would be difficult for Jones to assist his counsel ". . . due to his delusion of being God, i.e., if he is God, somehow things will work out without his having anything to do with it." In addition, Dr. Hill indicated that Appellee's loss of memory might also hinder his ability to assist in his own defense.

[3]For the purposes of this motion to dismiss appeal, the issue of estoppel raised by the prosecutor's actions need not be addressed.

to participate and to assist counsel in an extradition proceeding is ". . . irrelevant and cannot be raised by the defendant." (J.S. App. B8).

III.

Jones sought the protection of the Supreme Court of Appeals of West Virginia by filing a petition for a writ prohibiting Judge Warmuth from proceeding any further with the extradition proceedings until appropriate findings be made regarding Jones' competency to function in these extradition proceedings. That petition was granted in the opinion appealed from.

In its opinion, the West Virginia court, speaking through Justice Miller, held:

> In order to give meaning to a fugitive's right to test the legality of his arrest on the issue of his identity and presence in the demanding state at the time the crime was allegedly committed, and to give meaning to his right to have legal counsel, it is essential to due process under Article III, Section 10 of the West Virginia Constitution that such person has sufficient mental competency to understand the

proceeding and to consult with and assist his counsel in such proceeding.

272 S.E.2d at 446.

ARGUMENT

I. The Decision Below Did Not Invalidate Federal Law.

The appellant in his Jurisdictional Statement stipulates that this Court's sole jurisdiction in this matter ". . . derives from 28 U.S.C. § 1257(1)." (J.S. 3).

That provision provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

The opinion below, however, is grounded specifically and solely upon the provisions of Article III, Section 10 of the West Virginia constitution, which provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

While this section obviously bears a marked similarity to the Fifth Amendment to the Constitution of the United States, it is a different and independent provision which provides different and independent protections.

The Supreme Court of Appeals of West Virginia has compared the federal constitutional guarantees with its own and found that the latter encompass and indeed surpass the former.

> Inherent in the due process clause of the State Constitution are both the concept of substantive due process and the concept of equal protection of the laws.

State ex rel. Harris v. Calendine, ___W. Va. ___, 233 S.E.2d 318, 324.

> In the continuously evolving tradition of Anglo-American common law there can be no fixed definition of due process of law, which is an inherently elusive concept; nevertheless, it is apparent that due process of law under the West Virginia Constitution contains an equal protection component the scope and application of which are coextensive or broader than the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L.Ed.2d 389 (1974) which imports the equal protection clause of the Fourteenth Amendment into the Fifth Amend-

> ment to the United States Constitution, the due process language of which is nearly identical to that found in W.Va. Const., art. III, §10. See also Linger v. Jennings, 143 W.Va. 57, 99 S.E.2d 740 (1957), which strongly suggests that W.Va. Const., art. III, §10 affords West Virginia citizens a guarantee of equal protection of the laws as a matter of State constitutional doctrine.

Id. at 324 n.3.

It is clear, then, that West Virginia's constitutional due process guarantees are separate, independent, and more inclusive.

Appellant lists in his Jurisdictional Statement the statutes, etc., involved (the validity of which are mis-alleged to have been brought into question) as U.S. Const., art. IV, §2, cl. 2, and 18 U.S.C. §3182. However, the constitutional clause was acknowledged as controlling by the Court below (272 S.E.2d at 448) and the statute, fairly put, is not even suggested. By the very terms of the jurisdictional statute claimed, when the construction given by the Court below to the federal statute, etc.,

is favorable, no reason exists for review by appeal by this Court. See, e.g., Baker v. Baldwin, 187 U.S. 61 (1902); Missouri ex rel. Carey v. Andriano, 138 U.S. 496 (1891).

For the purposes of an appeal under 28 U.S.C. § 1257(1), it is necessary that the state court directly inquire into and deny the power to pass the statute. See Baltimore & Potomac R. Co. v. Hopkins, 130 U.S. 210 (1889). To be appealable, the state court decision must hold the treaty or statute invalid in whole or in part as applied to the particular circumstances of the case. Flournoy v. Wiener, 321 U.S. 253, 263 (1944).

Certainly, such a holding must be explicit; it is not enough that the state court merely construes the statute, etc. so as to deny a claim thereunder, or that it finds the facts so as to place the situation outside the scope of federal law. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 289-290 (1958). It is even less appropriate under

28 U.S.C. §1257(1) to review by appeal a ruling that clearly does not validate any federal law, but rests solely on state grounds.

II. This Honorable Court Lacks Jurisdiction To Review A West Virginia Decision Resting On Adequate Non-Federal Grounds.

As Justice Jackson wrote in Herb v. Pitcairn, 324 U.S. 117, 125 (1954), "[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."

If the West Virginia court decided only a non-federal question, or even if it can fairly be said to have decided both federal and non-federal questions, our doctrine of federalism teaches that the Supreme Court lacks jurisdiction to review if the non-federal ground is adequate to support the ruling. Id. "The reason is . . . found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our

only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." Id. at 125-126.

The Court has several times refused to take jurisdiction where the ground independent of a federal question is sufficient to sustain the holdings of the lower court. Durley v. Mayo, 351 U.S. 277 (1956); Buck v. California, 343 U.S. 99, 103; Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934).

Indeed, even when the basis of the state judgment is somewhat ambiguous, this Court has chosen the interpretation which does not present a constitutional question. Black v. Cutter Laboratories, 351 U.S. 292, 299 (1956).

The Supreme Court of Appeals of West Virginia went to great lengths to show that it acknowledged as controlling the federal constitutional and statutory provisions upon which Appellant seeks to base jurisdiction. All that the West Virginia court did was to add a protection for its

litigants; it is axiomatic that federal constitutional protections are minimums, not maximums. (See J.S. 10).

III. Appellant Has Failed To Show That The Question He Presents Is Either Federal Or Substantial.

As explained above, this case was decided below on a non-federal ground.

However, assuming arguendo that the question is federal, it is necessary to afford the basis for review (by either appeal or certiorari) that it also be substantial. E.g., Dixon v. Duffy, 342 U.S. 33 (1951); Hammerstein v. Superior Court, 340 U.S. 622 (1950); Herb v. Pitcairn, 324 U.S. 117 (1945).

To baldly allege that an appeal presents a substantial federal question is not enough; to say that the broadened state protection afforded Jones below ". . . squarely conflicts with an obligation among the states graven in the very words of the Constitution itself" (J.S. 10) when the West Virginia Court was so careful to find otherwise is simply not sup-

ported by the record.

IV. The Cases Cited By Appellant Are Distinguishable Or Inapposite.

Appellant complains that West Virginia incorrectly applied the teachings of Michigan v. Doran, 439 U.S. 282 (1978). The opinion below speaks for itself:

> In Michigan v. Doran 439 U.S. 282, 289, 99 S.Ct. 530, 535, 58 L. Ed.2d 521 (1978), the Court stated:
>
> "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable."
>
> We have recognized substantially the same limitations in Syllabus Point 1 of State ex rel. Gonzales v. Wilt, W.Va., 256 S.E.2d 15 (1979), and Syllabus Point 2 of State ex rel. Mitchell v. Allen, 155 W.Va. 530, 185 S.E.2d 355 (1971), cert. denied, 406 U.S. 946, 92 S.Ct. 2048, 32 L.Ed.2d 333 (1972):

> "In habeas corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers."

272 S.E.2d at 448.

> Despite variations in phrasing, the scope of inquiry set forth by the United States Supreme Court in Doran and this Court in Wilt and Mitchell are, in essence, the same.

Id. at 448 n.4.

The remaining similar cases cited by Appellant (with one slight exception discussed below) deal with the issue of incompetence at the time the crime was committed, or of incompetence to stand trial in the demanding state. They do not address the issue of the prisoner's inability to assist in the extradition proceedings themselves, meaningfully availing himself of his right to counsel. The slight exception is Kellems v. Buchignani, 518 S.W.2d 788 (Ky.

1975), in which the Kentucky court, in a two-paragraph opinion, held that ". . . the question of the mental competence of a fugitive in extradition proceedings is not relevant." 518 S.W.2d at 788. Appellee directs the Court's attention to the vigorous dissent.

Colorado found the question unnecessary to address directly in Luker v. Koch, 176 Colo. 75, 489 P.2d 191 (1971).

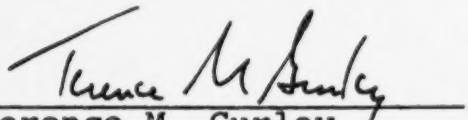
Alaska has confronted the question directly, Kostic v. Smedley, 522 P.2d 535 (Alaska 1974), and has ruled in favor of the rights of the alleged fugitive.

The cracks in the block beneath the ". . . unitary simple grandeur of the federal extradition scheme" alluded to by Appellant at p. 19 of his Jurisdictional Statement are not cracks - they are simply a permissible and separate extension of state constitutional guarantees.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,



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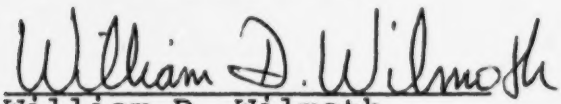

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APRIL 13, 1981.

CERTIFICATE OF SERVICE

I, William D. Wilmoth, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the attached Motion to Dismiss Appeal upon the appellant by placing three true copies thereof in a United States mailbox, first-class postage prepaid, addressed to his attorneys as follows:

Honorable Chauncey H. Browning
Attorney General

S. Clark Woodroe
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Richard S. Glaser, Jr.
Assistant Attorney General
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this 13th day of April, 1981.

William D. Wilmoth